United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1114

To be argued by
ANGUS MACBETH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1114

UNITED STATES OF AMERICA,
Appellee,

—v.—

DONALD PAYDEN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ANGUS MACBETH,
FREDERICK T. DAVIS,
Assistant United States Attorneys, Of Counsel.

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Preliminary Statement

Donald Payden appeals from a judgment of conviction entered on March 1, 1976, in the United States District Court for the Southern District of New York after a four-day trial before the Honorable Lee P. Gagliardi, United States District Judge, and a jury.

Indictment 75 Cr. 421, filed on April 28, 1975, charged Donald Payden, Billy Vernon, David Bell, Lester Bell and Jane Doe, a k a "Jackie Smith", with violations of the federal narcotics laws. Count One charged all the defendants with conspiracy to distribute and to possess cocaine in violation of Title 21, United States Code, Section 846. Counts Two and Three charged Payden and Vernon with distributing amounts of cocaine or possessing it with intent to distribute on August 6, 1974 and August 27, 1974, respectively. Count Six of the indictment as it was

originally filed charged Vernon and the Bell brothers with distribution and possession with intent to distribute 55.5 grams of cocaine on October 3, 1974. The remaining Counts Four, Five and Seven charged only defendants other than Payden or Vernon.*

On November 13, 1975, trial commenced against the defendants Payden and Vernon on Counts One, Two, Three and Six of Indictment 75 Cr. 421, redacted so as to include only Payden and Vernon. On November 18, 1975, the jury returned a verdict of guilty against Payden on Counts One and Three, not guilty on Count Two, and a verdict of guilty against Vernon on all four counts.

On March 1, 1976, Payden was sentenced to six years in prison on Counts One and Three, to be served concurrently, and to be followed by six years of special parole. In addition, on Count One he was fined $5,000. Payden has been released on bail pending the disposition of the appeal.

Statement of Facts

A. Pre-trial proceedings

At the time the indictment in the case was filed on April 28, 1975, bench warrants were issued as to each defendant. (A1)** In response to a pre-trial motion for a bill of particulars (A10-11), the Government informed Payden that attempts had been made by a police officer to locate and apprehend Payden on June 3, June 5, August 12, August 15, August 26, August 28, September

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* The two Bells and Jane Doe were fugitives at the time of trial. As will be developed more fully below, the case against them was severed from the case against Vernon and Payden.

** Citations to "A" refer to pages in the Appellant's appendix filed in this appeal.

8, September 10, and September 25, 1975. (A45) Payden was arrested on October 21, 1975. (A28) In moving to dismiss the indictment for what the defense characterized as "the unconscionable delay" (A19) between the date of the offense and the indictment and between the indictment and the arrest, Payden made only the conclusory charge that

> "it would be utterly absurd and impossible to suggest that the defendant would be in a position to adequately defend himself against the charges, or to obtain witnesses, or to establish any alibi as of the date, time and place when it is alleged the crime took place." (A25)

See also A64-65.

On October 28, 1975, the Government moved in open court in the presence of Payden's counsel to sever parts of the indictment: the names of David Bell, Lester Bell and Jane Doe, a k a "Jackie Smith", in paragraph 1 of Count 1, the overt acts numbered 8 through 17 in Count 1, and Counts 4 through 7. (10/28/75 Tr. 28-28A)* This severance would have restricted the trial to only those counts jointly involving Payden and Billy Vernon, that is, Counts One through Three. At that time a memorandum in support of the motion addressing the issue of joinder of the parties was served on counsel for both defendants. On October 31, 1975, Payden filed lengthy pre-trial motions; he did not include in those motions any mention of the Government's motion to sever, nor in any other way address the question of severance or joinder. (A10-20)

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* The transcript of the pre-trial proceeding held October 28, 1975 is not included in appellant's appendix; that transcript is cited as "10/28/75 Tr."

On November 13, 1975, before the commencement of the trial, the Government brought to the Court's attention the fact that the defendant Vernon had expressed the wish to stand trial on Count Six, which did not name Payden or concern a transaction that involved him. The Government stated that it was prepared and willing to try that count. (A80-81) Payden made no objection. The Court allowed Count Six to be tried together with the other counts. Moreover, at trial, when the evidence as to Count Six was introduced against Vernon, Payden made no objection to its introduction. (A121-127, 324-327) Finally, at the close of the Government's case, Payden made no motion for mistrial on the grounds of improper joinder. (A452-60)

B. The Trial

1. The Government's Case.

The principal witness for the Government was Police Officer Chris Jackson. He testified that on August 6, 1974, while acting in an overcover capacity, he was introduced to Payden's co-defendant, Billy Vernon, by a confidential informant. (A108) Jackson and Vernon had a conversation in which Jackson indicated that he was interested in buying cocaine of good quality and in which Vernon offered to obtain the cocaine from a connection. (A109) Jackson and Vernon then drove uptown and on 145th Street Vernon told Jackson that they had just passed "Country" (Donald Payden's familiar street name) who had the best cocaine around. (A110) They made a U-turn and drove back to where Payden was standing on the sidewalk. Vernon got out of the car and talked to Payden. He returned to Jackson and told him that "Country's" lieutenant had cocaine. (A111) After further negotiation between Vernon and Payden,

Jackson gave Vernon $800 for an ounce of cocaine and Vernon went into a club at 356½ West 145th Street to purchase the narcotics. At that point Payden went over and stood in front of the club. He took a long, hard look at Jackson and then went into the Club. (A111) Approximately ten minutes later Vernon came back to Jackson's car with the cocaine and the transaction was completed. (A112)

On the evening of August 27, 1974, Jackson met Vernon a second time on 116th Street. Vernon attempted to get cocaine for Jackson from a couple of Cuban connections but failed. (A115-116) Vernon then suggested going back to Payden in order to make another cocaine purchase from him. (A116) Jackson and Vernon found Payden once more on the sidewalk in front of the club at 356½ West 145th Street. Vernon left the car and talked to Payden; both of them then entered the club. Twenty minutes later Vernon came out and told Jackson that Payden had two ounces of cocaine but that he didn't want to deal until it got darker. (A116) Jackson then accompanied Vernon into the club, after being frisked and searched at the door where he was found to be carrying a gun. (A116-117) After spending about twenty minutes in the club with Vernon, Jackson heard Payden say to Vernon, "Billy, come on, we are going to do the deal." (A118) Jackson and Payden then nodded greetings to each other and all three went out onto the sidewalk as dusk was falling. (A118) Vernon and Payden had a conversation together and then Vernon spoke to Jackson telling him that Payden and he were going to get the cocaine and that he had to have $400 front money. (A118) Jackson gave Vernon the money and arranged to meet him later.

Payden and Vernon then got into a 1973 Mercedes Benz sports car with Payden in the driver's seat. (A119,

322-23) Payden made a fast U-turn on 145th Street, turned north on St. Nicholas Avenue, and, going at more than 40 miles per hour, successfully eluded the surveillance cars by the time he reached the Harlem River Drive. (A200) Jackson later met Vernon and paid him an additional $1250 and received the two ounces of cocaine. (A119-121)

On October 3, 1974, Jackson again met Vernon who suggested that they once more return to Payden to make a purchase of cocaine. Jackson said that he would like to try another source. (A123) Vernon pointed out Lester Bell to Jackson in a bar and then arranged to meet Lester and David Bell at his, Vernon's, apartment approximately one hour later. (A124) Later that evening the Bell brothers arrived at Vernon's apartment and sold Jackson slightly less than two ounces of cocaine for $1900, although the cocaine was not weighed until the Bells were no longer present. (A124-25) Later in the evening Vernon and Jackson met Lester Bell and Jackson complained that the cocaine was short weighted. (A125-26)

On October 23, 1974, Jackson met Vernon again and Vernon asked if he wanted to go back to Payden; Jackson agreed. (A127) They returned to the club at 356½ West 145th Street and Vernon went inside. He returned after ten minutes and told Jackson he would have to pay in advance for four ounces of cocaine. Jackson refused unless Payden was willing to meet personally with him and guarantee the narcotics. Vernon told him that Payden refused to meet: he was "leery" of Jackson due to the fact that a gun had been found on him when he was frisked entering the club on August 27, 1974. (A127-29) Further, Vernon stated that he had had to buy $50,000 worth of cocaine from Payden before Payden would deal with him hand-to-hand. (A129) No drug transaction was completed that day.

The Government also presented testimony from John Crowe (A294-99), and Herbert Wright (A311-27), who were New York City police officers, and David W. Major, an agent of the Drug Enforcement Administration (A-296-392), all of whom had conducted surveillance of officer Jackson's dealings. Police Officers Vance Herlihy (A286-289) and Myles Harrington (A374-76) testified to the chain of custody of the cocaine and Roger W. Godino, a DEA chemist, testified to the nature of the substance purchased by officer Jackson. (A425-432)

2. The Defense Case

The defense called various police officers involved in the case and attempted to develop inconsistencies with the testimony given on the Government's case and demonstrated, irrelevantly, that Payden was not in possession of narcotics at the time of his arrest on October 21, 1975. (A469-499)

ARGUMENT

POINT I

Objection to the joinder of Count Six was waived; in any event joinder was not prejudicial.

Payden contends that the fourth count of the redacted indictment (Count Six of the original indictment limited to Vernon alone)* was a misjoinder of an unrelated charge against the defendant Billy Vernon with the charges of Counts One, Two and Three, which charged Payden and Vernon jointly. He concedes that no motion

*The defendant's appendix prints this count as Count Six of the redacted indictment. (A34) It was treated as Count Four at trial. (A618)

to sever was made by trial counsel prior to or during the trial but argues that the circumstances justify this Court's examination of the alleged misjoinder and contends that the prejudice of the joinder to Payden requires remand of the case. (Brief at 13-14, 18-23) Payden's contention rests on a failure to present to the Court the full facts of this proceeding and a faulty analysis of possible prejudice; the claim is utterly without merit.

Payden states that the original indictment was facially sound, charging a conspiracy involving Payden, Vernon, the Bell brothers and a Jane Doe and thus no severance motion was called for. Payden contends that the Government first stated that Payden was not related either to the charges against the Bells and Jane Doe (Counts Four and Five and overt acts 8-12 in Count One) or to the charge against Vernon and the Bells (Count Six, overt acts 13-17 in Count One) three hours before trial began on November 13, 1975 and that in these circumstances the failure of trial counsel to object to possible prejudice and misjoinder of the fourth count of the redacted indictment was excusable.

This account simply misstates the facts. On October 28, 1975, more than two weeks before trial, the Government moved in open court and in the presence of Payden's lawyer to sever certain parts of the indictment for purposes of the trial: the names of David Bell, Lester Bell and Jane Doe, a k a "Jackie Smith," in paragraph 1 of Count One, the overt acts numbered 8 through 17 in Count One, and Counts Four through Seven. (10 28 75 Tr. 28-28A, see also 10 28 75 Tr. 6, 20) At that time the Government served on the District Court and on counsel for the defendants a memorandum of law in support of the motion which was devoted almost entirely to the issue of joinder. (*Id.*)

Three days thereafter, on October 31, 1975, Payden's counsel prepared lengthy motions in this case. No argument was made in support of the Government's motion to sever nor was the issue of joinder addressed. (A10-31) On November 3, 1975, Payden's motions were argued and ruled on. At that time defense counsel made no motion for severance or any reference to misjoinder. (A35-75)

On the morning of November 13, 1975, there was an additional pre-trial proceeding. At that time the Government brought to the attention of the court the request made by counsel for Billy Vernon to proceed to trial on Count Six as well as the other Counts—obviously reflecting a desire to avoid two trials against Vernon. (A80) The Government again stated the position it had taken on October 28, 1975, on the severance of Count Six of the original indictment, but indicated that it was prepared to try Count Six at that time. Payden's counsel, who was present during the discussion, failed to raise any objection whatsoever, and the Court allowed the count to be tried against Vernon as Count Four of the redacted indictment. (A81, 34)

The testimony concerning that count was received without any objection from Payden's counsel. (A121-27, 324-27) At the close of the Government's case Payden made no motion for a mistrial or acquittal on the basis of misjoinder. (A452-60)

Rule 12(b) of the Federal Rules of Criminal Procedure requires issues of misjoinder and severance to be raised before trial, specifically stating that requests for a severance of charges or defendants pursuant to Rule 14 must be raised prior to trial. (Rule 12(b)(5)) From October 28, 1975, Payden had full notice of the joinder problem and of the Government's position with respect to it. It was only at the request of counsel for Payden's co-defendant, Billy Vernon, that the Government was willing to try Count Six at trial.

It is firmly established law, as Payden concedes, that failure to make a motion for severance prior to trial waives the objection of misjoinder on behalf of the defendant. *United States* v. *Del Purgatorio*, 411 F.2d 84 (2d Cir. 1969); *United States* v. *Daniels*, 437 F.2d 656 (D.C. Cir. 1970); *Lelles* v. *United States*, 241 F.2d 21 (9th Cir.), *cert. denied*, 353 U.S. 974 (1957); *United States* v. *Russo*, 480 F.2d 1228 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974); *United States* v. *Koritan*, 182 F. Supp. 143 (E.D.Pa.), *aff'd*, 283 F.2d 516 (3rd Cir. 1960); *United States ex rel Dixon* v. *Cavell*, 284 F. Supp. 535 (E.D.Pa. 1968). Payden had more than adequate time to move for severance and furthermore for two weeks prior to trial he had full knowledge of the facts and of the Government's position. His failure to move for severance constitutes a waiver and he is barred from raising this point on for the first time on appeal to this Court.

In any event, the Government would have been entitled to present to the jury the evidence on which Count Six was based even if that count had not been tried. It is settled law in this Circuit that evidence of other crimes or similar acts is admissible, if relevant, except when offered solely to prove criminal character or disposition, and thus the evidence was clearly admissible against Vernon even if Count Six had not been part of the indictment. *United States* v. *Papadakis*, 510 F.2d 287, 294-5 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *Gerry*, 515 F.2d 130 (2d Cir. 1975); *United States* v. *Williams*, 470 F.2d 915, 917 (2d Cir. 1972); *United States* v. *Johnson*, 382 F.2d 280, 281 (2d Cir. 1970); *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967). Among the purposes for which prior and subsequent similar acts are admissible are proof of knowledge, intent, identity, and plan or design. *United States* v. *Miller*, 478 F.2d 1315, 1318 (2d Cir. 1973); *United States*

v. *Friedman*, 445 F.2d 1220, 1224 (2d Cir. 1971); *United States* v. *Johnson*, *supra*. Rule 404(b) of the Federal Rules of Evidence codified the existing law in the Second Circuit. Indeed, in a case charging conspiracy, evidence of prior or subsequent similar acts on the part of one conspirator may be offered at trial against that conspirator. *United States* v. *Papadakis*, *supra*; *United States* v. *Gerry*, *supra*; *United States* v. *Nathan*, 476 F.2d 456 (2d Cir. 1973).

It follows *a fortiori* that since the additional testimony was admissible against Vernon with or without the presence of Count Six in the indictment and since that testimony did not name or concern Payden, he was not prejudiced thereby. Indeed, his assertion boils down to the untenable claim that in a multi-count, multi-defendant indictment, any evidence not relevant to all defendants must necessarily be the subject of a separate trial, a position rejected by this Court, *United States* v. *Aloi*, 511 F.2d 585, 599 (2d Cir. 1975). Furthermore, the only claims of prejudice raised by Payden—concerning remarks about Vernon's activities during the prosecutor's summation that were so insignificant that no objection was even made at trial—hardly rise to the level necessary to support a finding of misjoinder. As this Court has held, an appellant "must demonstrate substantial prejudice from a joint trial, not just a better chance of acquittal at a separate one, and . . . a trial court's refusal to grant severance will rarely be disturbed on review." *United States* v. *DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), quoted in *United States* v. *Fantuzzi*, 463 F.2d 683, 687 (2d Cir. 1972).

The District Court's finding of no prejudice—when the issue was finally presented *after* trial—was fully within its discretion and should not be disturbed on appeal. *United States* v. *Cohen*, 518 F.2d 727, 736 (2d Cir. 1975); *United States* v. *Sperling*, 506 F.2d 1323, 1342 (2d Cir. 1974).

The evidence against Vernon in Count Six was admissible at trial and Payden clearly waived any claim of misjoinder. This claim is frivolous.

POINT II

There was more than sufficient independent evidence of Payden's participation in the conspiracy to permit the admission of Vernon's statements against Payden.

Payden claims that the non-hearsay evidence of his participation in the narcotics conspiracy with Vernon was not sufficient to allow the admission against him of Vernon's hearsay statements. (Brief at 24-28) This contention is without merit.

When conspiracy, agency or concert of action has been independently shown between two participants, the declarations of one are admissible against the other when they are in furtherance of that relationship. Rule 801 (d)(2)(D) and (E), Federal Rules of Evidence. See also *United States* v. *Ragland*, 375 F.2d 471, 476-77 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968); *Lufwak* v. *United States*, 344 U.S. 604 (1953); *United States* v. *Krulewitch*, 336 U.S. 440 (1949); *United States* v. *Accardi*, 342 F.2d 697 (2d Cir.), *cert. denied*, 382 U.S. 954 (1965). The Government bears the burden of showing such a relationship by a fair preponderance of the non-hearsay evidence. *United States* v. *Glazer*, — F.2d —, slip op. 2201 (2d Cir. March 1, 1976); *United States* v. *Wiley*, 519 F.2d 1948 (2d Cir. 1975); *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970).

In the present case, sufficient independent connecting evidence was shown both through the actions taken di-

rectly by Payden and through the verbal acts of Vernon. Police Officer Jackson testified that on August 6, 1974, when the first sale of cocaine was made, Payden, following his conversation with Vernon, lingered on the sidewalk before entering the club at 356½ West 145th Street and took a long, hard look at Jackson.* (A111-12) Such inspection was totally unnecessary and unlikely except in the circumstances where Payden contemplated engaging in a transaction with Jackson and wished to make an independent judgment of him.

On August 27, 1974, Jackson and Vernon returned to 356½ West 145th Street and Vernon entered the club. He came out of the club and told Jackson that Payden did not want to do business until it was darker. Jackson and Vernon then entered the club. Later, inside the club, Payden said to Vernon, "Billy, come on, we are going to do the deal." (A118)** Jackson and Payden then nodded greetings to one another and all three went out onto the sidewalk as dusk was falling. (A118) After talking to Payden alone, Vernon told Jackson that he was going with Payden to get the cocaine and they proceeded to drive off with him at a high rate of speed.

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* Contrary to indication in Payden's Brief at 24-25, the fact that Payden was acquitted by the jury on Count Two, which concerned the sale on August 6, 1974, is irrelevant to a determination by the Court of whether the non-hearsay evidence showed a conspiratorial relationship. As this Court has held on several occasions, since proof by a mere preponderence of the evidence must be shown to permit admissibility of co-conspirators' statements, failure to prove a criminal conspiracy beyond a reasonable doubt does not deprive such statements of a foundation. *United States* v. *Finkelstein*, 526 F.2d 517 (2d Cir. 1975); *United States* v. *Zane*, 495 F.2d 683 (2d Cir. 1974).

** Since this oral statement came from Payden's mouth, it was clearly admissible independently of a finding of a conspiratorial relationship and was thus highly probative in showing the conspiracy. See *United States* v. *Geaney*, *supra*, 417 F.2d at 1120, n. 3.

Vernon's statements to Jackson concerning his activities with Payden were admissible irrespective of the co-conspirator exception since they lent legal significance to otherwise ambiguous acts and thus were not hearsay but rather verbal acts. Verbal acts are not hearsay since they are not admitted to show the truth of the matter asserted. 6 Wigmore, Evidence § 1772 (3d ed. 1940); *United States* v. *D'Amato*, 493 F.2d 359, 363 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *Wiley*, *supra*. In order to treat the utterances as verbal acts certain conditions must be met: (1) the conduct to be characterized by the words must be independently material to the issue; (2) the conduct must be equivocal; (3) the words must aid in giving legal significance to the conduct; and (4) the words must accompany the conduct. 6 Wigmore, *supra*.

Vernon's statements on August 27th were clearly such verbal acts: taken alone Payden's acts were ambiguous, Vernon's words accompanied the action, aided in giving it legal significance and, of course, the action was material to showing the concerted action of Vernon and Payden. Indeed, the situation is virtually identical to the facts in *United States* v. *D'Amato*, *supra*. In that case the only observation concerning the defendant Abramo was that he was seen driving a car in which other defendants carried narcotics during an undercover transaction. This Court held, however, that statements made to an agent by one Burdieri concerning the purpose of the automobile ride—which might be considered hearsay when "viewed simplistically," 493 F.2d at 363—were in fact not hearsay but verbal acts. In particular, this Court noted "that portion of [Burdieri's] utterances to [an undercover agent] limited to establishing that a sale of heroin was to take place that evening may be considered as an item of circumstantial evidence in determining whether the pre-

ponderence test was met as to Abramo's membership in the conspiracy . . ." *Id.* at 364. Similarly, Vernon's statements to Jackson were circumstantial but powerfully probative evidence concerning the nature and purpose of his association with Payden.

The remarkable parallel to *D'Amato* continues with Payden's quick U-turn on 145th Street and his fast getaway toward the Harlem River Drive. Payden was more successful than the defendant Abramo in the *D'Amato* case in shaking off the surveillance, but his excessive speed shows that his intention was identical. Unlike the situation in *United States* v. *Steward*, 451 F.2d 1203 (2d Cir. 1971), the evidence shows that in this case Payden was much more than a mere chauffeur. Both his prior acts and the rate at which he drove off preclude an innocent explanation. Nor was he a simple bystander in a parking lot as was defendant Gaber in *United States* v. *Cirillo*, 499 F.2d 872 (2d Cir. 1974).

Finally, Payden's remark to Vernon about doing a deal provides evidence from Payden's own lips of what was transpiring between Vernon and Payden. There is no suggestion or evidence that Vernon and Payden were dealing in anything other than narcotics. The statement in itself clearly shows Payden's knowledge of and participation in the conspiracy. "An otherwise innocent act of 'relatively slight moment' [*United States* v.] *Garguilo* [310 F.2d 249, 253 (2d Cir. 1963)] may, when viewed in the context of surrounding circumstances, justify an inference of complicity." *United States* v. *Ragland*, *supra*, at 478. Here the context and circumstances sufficiently support the findings of Payden's participation in a conspiracy with Vernon to allow Vernon's hearsay statements to be presented to the jury.

In the present case Payden's acts—both those that stand on their own such as his remark about "doing a

deal," his inspection of Jackson, and his fast getaway from 145th Street, and those that are explained by Vernon's verbal acts such as his waiting for nightfall and h departure with Vernon—provide evidence of the conspiracy independent of any hearsay statements by Vernon and sufficiently show the concert of action between Payden and Vernon. *United States* v. *D'Amato, supra; United States* v. *Ruiz*, 477 F.2d 918 (2d Cir. 1973) (narcotics sale; non-hearsay evidence connecting co-conspirators was testimony that Ruiz was seen to nod at a co-conspirator during narcotics transactions and that that co-conspirator's telephone number was found in Ruiz' possession). Although here there was direct evidence of Vernon's relationship with Payden this Court has held that particularly in narcotics cases the non-hearsay evidence may be entirely circumstantial. *United States* v. *Manfredi*; 488 F.2d 588, 596-597 (2d Cir. 1973). The evidence in this case went far beyond the legal standard, and Vernon's statements were properly admitted by the District Court.

POINT III

Neither the time elapsed between the offense and Payden's arrest nor the time elapsed between the arrest and trial provide any basis for a remand.

A. The time between the offense and the arrest

Payden claims that he was denied his right to due process of law by the passage of time between the offense of which he is accused and the date of his arrest. (Brief at 29-34) In a pretrial motion he characterized this lapse of time as unconscionable delay (A19) and further claimed

> "It would be utterly absurd and impossible to suggest that the defendant would be in a position to adequately defend himself against the charges, or to obtain witnesses, or to establish any alibi as of the date, time and place when it is alleged the crime took place." (A25)

At oral argument defense counsel was no more precise as to what prejudice was in fact suffered, adding only the cryptic remark that "[s]ometimes so much time passes that you cannot find that prejudice that might exist if in fact he had been found earlier." [sic] (A64) This claim is without merit on the facts or the law.

The last criminal act of Payden presented at trial took place on October 23, 1974. (A127-130) The indictment in this case was filed on April 28, 1975, and bench warrants were immediately issued for the arrest of the defendants. (A1) Between the filing of the indictment and the arrest of Payden on October 21, 1975, police officers attempted to locate Payden on nine separate occasions and were unable to do so. (A45) The passage of six months from offense to the filing of the indictment is not unconscionable, it is not even abnormal in an undercover operation where undercover agents and confidential informants must be protected in the course of an ongoing investigation.

It is clearly established law that no Sixth Amendment right to speedy trial is violated by the passage of time prior to indictment. *United States* v. *Marion*, 404 U.S. 307 (1971); *United States* v. *Simmons*, 338 F.2d 804 (2d Cir. 1964). In order to claim a violation of the Fifth Amendment right to due process of law the defendant must show both the substantial prejudice of any delay to his case and that the delay was an intentional device used to gain tactical advantage, *United*

States v. *Marion*, *supra*, at 324.* Here Payden can make neither showing, and his claims of prejudice are nothing more than self-serving, conclusory claims. There is no suggestion of actual witnesses who were not available.** There is no hint of any other evidence that had been lost or destroyed. In reality, there is no concrete claim of prejudice beyond the claim that the passage of time is prejudicial. Clearly the passage of six months or a year is not in itself prejudicial. *United States* v. *Marion*, *supra*, (3 years from offense to indictment); *United States* v. *Capaldo*, 402 F.2d 821 (2d Cir. 1968) (40 months from offense to indictment); *United States* v. *Simmons*, *supra*, (27 months from offense to trial); *United States* v. *Hammond*, 360 F.2d 689 (2d Cir. 1966) (15 months from offense to arrest); *United States* v. *Dickerson*, 347 F.2d 783 (2d Cir. 1965) (17 months from offense to arrest. Both the Supreme Court in *Marion*, *supra*, 404 U.S. at 322-323, and this Court, see *United States* v. *Brasco*, 516 F.2d 816, 818 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975); *United*

* The Supreme Court in *Marion* stated that in order to prevail on the issue of pre-indictment delay a defendant must show intentional delay *and* actual prejudice. While this Court has on occasion indicated that at least a demonstration of prejudice is necessary to sustain this defense, see *United States* v. *Iannelli*, 461 F.2d 483, 485 (2d Cir.), *cert. denied*, 409 U.S. 980 (1972); *United States* v. *Mallah*, 503 F.2d 971, 989 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975), it has recently stated that it has not resolved the issue of whether the *Marion* requirements are in the disjunctive or in the conjunctive. *United States* v. *Finkelstein*, 526 F.2d 517, 525 (2d Cir. 1975). While the Government maintains that both logic and the language of the *Marion* opinion clearly require a reading of the operative language in the conjunctive, the Court need not resolve that issue in this case since Payden has shown neither deliberate delay nor actual prejudice.

** In fact Payden was successful in serving a subpoena on one John Law who was the informant who made the introduction in this case. (A. 283-84, 461).

States v. *Foddrell*, 523 F.2d 86, 87-88 (2d Cir. 1975); *United States* v. *Brown*, 511 F.2d 920, 922-923 (2d Cir. 1975), *cert. denied*, — U.S. — (44 U.S.L.W. 3397, January 13, 1976), have emphasized that a showing of *actual* prejudice to the right of a fair trial, rather than presumed or imagined prejudice, is unnecessary to sustain the defense. Payden's claims fall far short of this mark. Moreover the period from April 28, 1975, to October 21, 1975, cannot by any stretch of the imagination be called unjustified when the Government, making diligent efforts, was unable to locate Payden.

Payden now requests a remand and hearing on this issue. This is a request raised for the first time in this Court. His motions were argued approximately two hours after they were received by the Government. (A36) At that time the Government offered, in response to a demand for a bill of particulars, the information then in the possession of the United States Attorney as to the efforts made to locate Payden and made a response as to the claims of delay. (A45, 64) Payden at that time made no claim for a hearing nor a demand to present evidence on the issues. He is thus barred from now stepping forward with post-trial evidence in the form of letters to the judge (Brief at 2-3) —never open to close scrutiny or cross-examination by the Government—suggesting that the Government was remiss in locating him.

Payden has demonstrated neither excessive nor unjustified delay in the time between the offense and his arrest, nor prejudice to his case from the passage of time. This claim is without merit.

B. The time between arrest and trial

Payden claims that the period between arrest and trial was so short as to deny him his rights under both

the Fifth and Sixth Amendments and that he should thus have been granted a continuance. (Brief at 13-17) This claim is also without foundation.

The heart of this point in Payden's brief is his claim that the more than three weeks which passed between Payden's arrest on October 21, 1975, and the beginning of trial on November 13, 1975, was too short to allow trial counsel to identify the issue of joinder. This is absurd when one sees all the facts set out in Point I above. There is very little else to Payden's claim of violation of his right to due process of law and effective assistance of counsel. Unlike *Gavino* v. *McMahon*, 499 F.2d 1191 (2d Cir. 1974), there were no witnesses at distant places unavailable to defense counsel. Unlike *Stans* v. *Gagliardi*, 485 F.2d 1290 (2d Cir. 1973), this indictment was simple—two substantive counts and one conspiracy count involving events on three days; the testimony, now reduced to less than 400 pages of transcript, consumed less than three trial days. No cogent reasons are advanced by Payden as to why three weeks were not sfficient time to prepare for this simple trial. It is axiomatic that a request for a continuance is addressed to the discretion of the District Court and a denial will not be reviewed on appeal in the absence of a clear showing that this discretion was abused. *United States* v. *Frattini*, 501 F.2d 1234, 1237 (2d Cir. 1974); *United States* v. *Pelligrino*, 273 F.2d 570, 570 (2d Cir. 1960); *United States* v. *Coleman*, 272 F.2d 108, 110 (2d Cir. 1959). This claim is without merit.

POINT IV

Failure to hold an identification hearing was not error.

Payden claims that the trial court erred in not granting him an identification hearing for which his counsel moved. (Brief at 35) There is no merit to this claim.

Payden's brief is confused or misleading as to what sort of hearing was requested and is totally devoid of any claim of the use of improper identification procedures. Prior to trial, counsel moved for an order suppressing "improperly acquired identification evidence" (A19) and supported that request with an affidavit addressed to the identification of Payden at his arrest. (A27-28) Payden did not claim—and still does not claim—that any pre-trial procedures with respect to identification were improper. His claim appears to be simply that he was not the person whom the agents observed engaging in narcotics dealings. This claim, involving the accuracy of the officers' observations rather than any procedural defects, was properly directed to the jury.

The brief filed in this Court creates the impression that the in-court identification of Payden was challenged and that the District Court refused to examine into the in-court identification. That is not the case. In court Payden was identified by police officer Jackson and by a surveillance officer and those identifications were made without any objection from the defense. (A110-111, A320) The defense called the arresting officer at trial and improperly attempted to elicit from him whether or not Payden had narcotics or weapons on him at the time of his arrest, but made no effort to inquire into the bases of the arrest or the identification of Payden, either in or out of the presence of the jury. (A472-75)

Payden was arrested on the basis of a bench warrant issued after the filing of the indictment. (A1, A472-3) The bench warrant, of course, authorized the arrest of Donald Payden. There was never any question that the man who stood trial was not Donald Payden. No protest to that effect was ever made and, in fact, an affidavit signed "Donald Payden" was submitted to the court on November 7, 1975, in support of the defendant's motion to suppress his statements. (A2)

In these circumstances Judge Gagliardi was entirely correct in refusing to hold a hearing on the arrest identification. The only question open where a bench warrant is issued is whether the man arrested is the man named in the warrant. *Greenwell* v. *United States*, 336 F.2d 962 (D.C. Cir. 1964). There was never any claim that defendant was not Donald Payden and thus there were no facts in dispute which required the taking of evidence or a hearing.

As to the in-court identification, the defendant never raised any issue as to those identifications. The identifications went unchallenged and Payden may not now for the first time raise this issue on appeal. This claim is utterly without logic or merit.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

ANGUS MACBETH,
FREDERICK T. DAVIS,
Assistant United States Attorneys,
Of Counsel.

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United States Court of Appeals
For the Second Circuit

United States of America :

v : AFFIDAVIT OF MAILING

Donald Payden : 76-1114

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ANGUS MACBETH being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20th day of May, 1976 he served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed as follows:

Jay Goldberg Esq
299 Broadway
New York, New York

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing ~~in the~~ outside the United States Courthouse, Foley Sq. Borough of Manhattan, City of New York.

Angus Macbeth

Sworn to before me this
20th day of May, 1976